Supreme Court U.S.
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No. 02-545

In The

Supreme Court of the United States

STATE OF HAWAII, et al.,

Petitioners,

v.

RICHARD K. LOVELL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR THE PETITIONERS

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I. THE COURT SHOULD HOLD THE FIRST QUESTION PENDING ITS DECISION IN *HASON*.

1. Because the Court has granted certiorari in *California Medical Bd. v. Hason*, No. 02-479, to review the first question presented in this case, it should follow its traditional practice of holding the question pending decision in *Hason*. Respondents' suggestion to the contrary rests largely upon the claim that the district court's judgments may not have been final. This argument is wholly without merit, for the district court entered a final judgment in favor of respondents and against petitioners awarding damages in a sum certain in each of the four cases now before this Court. *See* Pet. App. 56a, 69a, 72a, 73a. These orders, headed "JUDGMENT IN A CIVIL CASE," "end[] the litigation on the merits and leave[] nothing for the court to do but execute the judgment." *Cunningham v. Hamilton County,* 527 U.S. 198, 204 (1999) (citations and internal quotations omitted).

If, as the United States suggests, *see* Brief for the United States in Opposition ("U.S. Br.") 7-8, 10-11, the district court erred in resting its judgments in these cases upon *Burns-Vidlak*, such error would merely affect the *correctness* of the final judgments entered (an issue not before this Court and not affecting the jurisdiction of the court of appeals or this Court); it does not change the fact that the court did indeed enter final judgments in these cases.[1] If the *Burns-Vidlak* court were to alter its interlocutory decision in that case, or if it were reversed on appeal, *see id.* at 8, the judgments in this case would remain final

[1] The United States argues that the district court's reference to FED. R. CIV. P. 54(b) suggests that some "rights and liabilities" remain to be resolved, U.S. Br. 8, but fails to point out that the district court specifically concluded that Rule 54(b) certification was "'not required'" because the judgment awarding compensatory damages was final, and the court of appeals upheld that conclusion. Pet. App. 11a (quoting district court).

and Hawaii would have no recourse in these cases beyond that afforded by FED. R. CIV. P. 60(b) – an avenue of relief that is always available to a party subject to a final judgment. Thus, the court of appeals correctly held that it had jurisdiction, Pet. App. 9a-14a, and there is no basis to question this Court's jurisdiction.[2]

2. Respondents also argue that the State waived sovereign immunity in *Burns-Vidlak*. U.S. Br. 9-10; Brief of Respondents in Opposition ("Resp. Br.") 9-11. But they have offered no explanation for why a statement in *Burns-Vidlak*, made prior to class certification and before the State of Hawaii was joined as a defendant, should be construed as a waiver in the completely separate suits brought by respondents. *See* Pet. 6 n.5. At most, any waiver is limited to Burns-Vidlak's claim against Director Chandler. When the statement was made, respondents had not yet asserted their claims, nor had the court permitted Burns-Vidlak to assert their claims for them as a class representative, nor had Burns-Vidlak amended his complaint to bring a claim against the State.

Moreover, the statement giving rise to the alleged waiver was merely an accurate response to a question of law posed by the court in which counsel acknowledged damages were available against the State because Congress had abrogated sovereign immunity. *See Pennsylvania v. Union Gas Co.*, 491 U.S. 1 (1989), *overruled by Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996). A correct concession that under then-existing law Congress could unilaterally abrogate the State's immunity hardly constitutes a "voluntary invocation[] of federal jurisdiction," *Lapides v. Bd. of Regents*, 122 S. Ct. 1640, 1645 (2002), that would give rise to a waiver of sovereign immunity.

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[2] It is true, as respondents point out, that the State did draw the question to the attention of the court of appeals, but that in no way changes the fact that the judgments are final.

The United States seeks to avoid these dispositive points by suggesting that "three years *after Seminole Tribe* and in an appeal involving both the State of Hawaii and Director Chandler, petitioners left the Ninth Circuit with no doubt that they had abandoned their Eleventh Amendment immunity argument." U.S. Br. 9 (citing and quoting *Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999)). But the referenced passage cites only the district court's opinion – *not* any statement by Hawaii on appeal. *See Burns-Vidlak v. Chandler*, 165 F.3d 1257, 1260 (9th Cir. 1999) (citing *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 770 (D. Haw. 1996) ("The State has admitted that if it violated section 504, it is liable to Plaintiffs for damages.")). And the district court cited only the statement made by counsel at the 1996 summary judgment hearing. *Burns-Vidlak v. Chandler*, 939 F. Supp. 765, 767 n.2 (D. Haw. 1996).

Respondents do not deny that the State raised its sovereign immunity defense in its answers in each of the cases before the Court in this petition, *see* Resp. Br. 10 (citing Pet. App. 82a, 84a, 86a, 88a), and it is settled circuit precedent that a State need only raise sovereign immunity in its answer to preserve it. *See, e.g., Demshki v. Monteith*, 255 F.3d 986, 989 (9th Cir. 2001). Nevertheless, the private respondents (but not the United States) appear to argue that petitioners waived sovereign immunity in their opening brief in the court of appeals. *See* Resp. Br. 10. They are mistaken: the State argued sovereign immunity on, *inter alia*, pages 38-41 of its opening brief.

Where, as here, the Ninth Circuit declined to reach respondents' waiver arguments, Pet. App. 18a, those arguments cannot support a departure from the Court's ordinary practice of vacating and remanding following a decision in another case on the question presented. There is no reason not to give the court of appeals the opportunity to address the waiver question in the first instance.

3. Finally, respondents argue that the Court need not hold the first question in this case for *Hason* because the judgments are independently supported by Section 504 of

the Rehabilitation Act. U.S. Br. 11; Resp. Br. 8-9. This argument fails for two reasons. First, as we explain *infra*, certiorari should be granted to resolve the circuit conflict on the Section 504 issue either in this case or in *Hawaii v. Vinson*, No. 01-1878, which involves only a Section 504 claim. Second, even if the Court concludes otherwise, it is still appropriate to hold this case in order to permit the court of appeals to reassess its decision in light of *Hason*. Title II and Section 504 are closely related, and this Court's additional instruction could shed new light on the Section 504 analysis. Indeed, the Ninth Circuit withdrew this case from submission to await this Court's ruling in *Board of Trustees v. Garrett*, 531 U.S. 356 (2001), and called for supplemental briefing after *Garrett* was decided even though that case did not directly address Section 504.

II. THE COURT SHOULD GRANT CERTIORARI IN THIS CASE OR IN *VINSON* TO RESOLVE THE CIRCUIT SPLIT OVER THE SECTION 504 ISSUE.

1. Respondents do not deny that the decision below conflicts with the Second Circuit's decision in *Garcia v. S.U.N.Y. Health Scis. Ctr.*, 280 F.3d 98, 114-15 (2d Cir. 2001). Nor do they dispute the importance, to all fifty States, of the question whether acceptance of federal funds effects a waiver of the States' sovereign immunity against private suits brought under Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. Nevertheless, the United States attempts to downplay this manifest circuit split by inaccurately suggesting that this Court's decision in *Lapides* has indirectly superceded *Garcia*. *See* U.S. Br. 13-14.

In *Lapides*, the Court held that a State's voluntary removal of an action to federal court effected a waiver of immunity from suit. 122 S. Ct. at 1646. The Court repeatedly emphasized the fact that Georgia had itself *voluntarily* chosen to have the suit heard in federal court by removing the action from state court. *Id.* at 1644; *see also id.* at 1645 ("this case involves a State that *voluntarily* invoked the jurisdiction of the federal court"); *id.* at 1646 ("removal is a

form of voluntary invocation of a federal court's jurisdiction sufficient to waive" sovereign immunity). The Court rejected Georgia's argument that "its motive for removal was benign," and not intended "to obtain litigating advantages for itself," *id.* at 1644, explaining that "[m]otives are difficult to evaluate, while jurisdictional rules should be clear." *Id.* at 1645. In contrast to *Lapides*, New York in *Garcia*, and Hawaii in this case, were indisputably haled *involuntarily* into federal court.

In an ill-founded effort to discredit *Garcia*, the United States mischaracterizes the Second Circuit's reasoning, suggesting that the court's holding rested upon New York's subjective beliefs. U.S. Br. 13. In stark contrast to Georgia's argument in *Lapides*, however, the *Garcia* court did not purport to divine New York's subjective intentions at the time it accepted the federal funds said to have effected the waiver. Rather, the Second Circuit conducted an objective inquiry into whether the State's waiver should be deemed voluntary under the relevant circumstances. Because "the proscriptions of Title II and § 504 are virtually identical, a state accepting conditioned federal funds could not have understood that in doing so it was actually abandoning its sovereign immunity from private damages suits, since *by all reasonable appearances* state sovereign immunity had already been lost." 280 F.3d at 114 (emphasis added) (citing *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999)). Respondents do not deny that Hawaii's decision to accept federal funds cannot be distinguished from that of New York. Unless this Court grants review, irreconcilable conflict will persist between the Courts of Appeals as to whether there is a valid waiver of state sovereign immunity in such circumstances.

More generally, respondents are wrong to suggest that waiver of sovereign immunity may be inferred from, without more, (i) the language of 42 U.S.C. § 2000d-7(a)(1) purporting to abrogate Eleventh Amendment immunity in Section 504 cases, and (ii) the acceptance of federal funds. U.S. Br. 12; Resp. Br. 16. As both the Second Circuit and Judge O'Scannlain have demonstrated, this Court's cases have required more. *See Garcia*, 280 F.3d at 114; *Douglas v.*

California Dep't of Youth Auth., 285 F.3d 1226, 1228-31 (9th Cir.) (O'Scannlain, J., dissenting from the denial of rehearing en banc), *cert. denied*, 122 S. Ct. 2591 (2002). Specifically, this Court has emphasized the "fundamental difference between a State's expressing unequivocally that it waives its immunity and Congress' expressing unequivocally its intention that if the State takes certain action it shall be deemed to have waived that immunity." *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 680-81 (1999).

Of course, Section 2000d-7(a)(1) speaks only to the latter (i.e., Congress' offer); as to the former (i.e., the effect of the State's action), the Court has laid down three principles that respondents would simply ignore: (i) "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected," *College Sav. Bank*, 527 U.S. at 682; (ii) "an effective waiver of a constitutional right is the 'intentional relinquishment or abandonment of a *known* right or privilege,'" *id.* (citation omitted) (emphasis added); and (iii) "'[c]ourts indulge in every reasonable presumption *against* waiver' of fundamental constitutional rights," *id.* (citation omitted) (emphasis added). The Second Circuit and Judge O'Scannlain correctly concluded that application of these principles required analysis of the objective legal circumstances that existed when the State committed the act said to have waived its constitutionally guaranteed immunity. Such an inquiry is necessary to determine whether the acceptance of federal funds reasonably reflected an intentional decision to relinquish a known right.

Finally, private respondents' contention that Hawaii did not argue this point to the court of appeals, *see* Resp. Br. 16, is wholly without merit. Notably, the United States makes no such contention, for it is beyond question that Hawaii *did* press this argument below, and did so specifically with reference to *Garcia*. Pursuant to FED. R. APP. P. 28(j), Hawaii submitted a letter to the court of appeals on October 22, 2001, apprising it of the Second Circuit's then-recent decision in *Garcia*, and arguing that "'a state accepting conditioned federal funds could not have understood

that in doing so it was actually abandoning its sovereign immunity . . ., since by all reasonable appearances state sovereign immunity had already been lost.'" (quoting *Garcia*, 280 F.3d at 114). Hawaii made a similar argument in briefing submitted prior to *Garcia*. C.A. Brief for Defendant-Appellants in Response to Brief of Intervenor United States 23 ("Once the States' immunity has been abrogated, there is nothing left for an individual State to waive.") (citing *Pugliese v. Arizona Dep't of Health & Human Serv.*, 147 F. Supp. 2d 985, 991 (D. Ariz. 2001) (if immunity abrogated by ADA, no clear declaration of waiver under Section 504 was possible)).

2. Respondents maintain that Hawaii failed to argue below that 42 U.S.C. § 2000d-7(a)(2) is too ambiguous, *see Lane v. Pena*, 518 U.S. 187, 198 (1996), to invite a waiver of Hawaii's sovereign immunity with respect to liability for money damages. *See* U.S. Br. 14; Resp. Br. 14. To the contrary, Hawaii specifically argued, citing *Lane*, that neither the text of Section 2000d-7 nor that of Section 504 "clearly stated" the remedies available against the States for violation of Section 504, and thus Congress has not made "the States aware that the full panoply of damages . . . hang[s] over their sovereign heads." C.A. Supplemental Opening Brief of Defendant-Appellants (C.A. Supp. Br.") 9.[3]

On the merits, the United States would have the Court simply ignore 42 U.S.C. § 2000d-7(a)(2) (describing the remedies available "[i]n a suit against a State"), in considering whether Congress has clearly conditioned federal funds upon a waiver of sovereign immunity against private

[3] Respondents further suggest that the Ninth Circuit's failure to address the issue in its opinion militates against certiorari. U.S. Br. 14; Resp. Br. 14. But the Ninth Circuit has resolutely refused to conduct *any* legal analysis of the serious questions raised by private Section 504 suits for damages against the States, deeming the matter "foreclose[d]" by Circuit precedent. App. 16a; *see also Vinson v. Thomas*, 288 F.3d 1145, 1151 (9th Cir.) (issue "foreclosed"), *petition for cert. filed*, (U.S. June 20, 2002) (No. 01-1878).

damage suits. U.S. Br. 14-15. The Government is unable to cite any authority for this unprecedented suggestion,[4] and this Court's cases effectively repudiate it. In *Lane* itself, the Court expressly considered both subparagraphs (a)(1) and (a)(2) in the course of considering whether Section 2000d-7(a) effected a waiver of the federal government's sovereign immunity. 518 U.S. at 198-200. More generally, the Court's clear statement jurisprudence forecloses the narrow approach urged by the United States. *See, e.g., Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 19 (1981).[5]

Finally, the United States complains that construing Hawaii's waiver as failing to embrace suits for money damages would "render the statute a practical nullity." U.S. Br. 16. If Section 2000d-7(a)(2) does not authorize damages suits against the States, the argument goes, it adds nothing, for suits for injunctive relief are already available under *Ex parte Young*, 209 U.S. 123 (1908). Both the premise and the conclusion the Government would draw from it are flawed. As to the conclusion, even if application of the clear statement rule would render the statute a "nullity," it does not follow that the rule should not be applied. The goal

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[4] The United States does cite *FDIC v. Meyer*, 510 U.S. 471, 480 (1994), in which the Court considered an unqualified sue-and-be-sued clause, but the statute there contained no second sub-paragraph limiting the available remedies against the sovereign.

[5] The United States briefly argues that Section 2000d-7(a)(2) unambiguously notified the States that damages are available because "*Lane* made clear that the federal government could be sued for damages for violations of Section 504 when it was sued for its actions as a 'provider' of federal funds." U.S. Br. 16. In fact, *Lane* said no such thing; after remarking on "the somewhat curious structure of the liability and remedy provisions" of the Rehabilitation Act, the Court simply observed that any waiver could not possibly extend "beyond the narrow category of § 504(a) violations . . . by 'Federal provider[s].'" 518 U.S. at 193. Far from concluding that Congress had clearly and unambiguously waived the federal government's immunity even in this "narrow category," the Court pointedly contrasted "[t]he lack of clarity in [the] 'Federal Provider' provision" with Congress' unambiguous waiver of liability for Section 501 claims. *Id.*

of the clear statement rule is not to divine the unexpressed intent of Congress; it is to "enable the States to exercise their choice knowingly, cognizant of the consequences of their participation" in a federal program. *Pennhurst*, 451 U.S. at 17. As to the premise: read in accordance with the clear statement rule, Section 2000d-7(a) invites waiver of sovereign immunity against suits seeking declaratory and injunctive relief brought directly against a State or its arm that would not be permissible under the *Young* doctrine. *See, e.g., Alden v. Maine*, 527 U.S. 706, 756-57 (1999).

3. Respondents do not deny that this Court has noted, but failed to reach, the "argument that implied causes of action against States (and perhaps nonfederal state actors generally) are inconsistent with the clear statement rule. . . . " *Alexander v. Sandoval*, 532 U.S. 275, 293 (2001) (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 656-57, 684-85 (1999) (Kennedy, J., dissenting)). Instead, the United States mistakenly claims that Hawaii did not raise this argument in the Court below. U.S. Br. 16. In fact, Hawaii made this argument *in terms* to the court of appeals: "the contract and clear statement rules regarding spending clause legislation compel the conclusion that the State of Hawaii cannot be deemed to have waived its constitutionally guaranteed immunity in cases where *Congress* has not expressly provided for the cause of action and the exact remedy in the *statute itself*." C.A. Supp. Br. 10 n.8 (citing *Davis*, 526 U.S. at 656-57 (Kennedy, J., dissenting)).

On the merits, the United States argues that Section 2000d-7 and Section 505(a)(2) of the Rehabilitation Act, 29 U.S.C. § 794a(a)(2), satisfy the clear statement rule by approving implied causes of actions against the States. U.S. Br. 16-17. But this Court has instructed that a waiver of sovereign immunity will not arise unless Congress makes clear *in the text* of a statute that States accepting federal funds will specifically be subject to a cause of action. *Pennhurst*, 451 U.S. at 17. Neither Section 2000d-7 nor Section 505(a)(2) meets that high standard. No statutory text expressly states that *anyone* is subject to suit for violation of Section 504. In order to learn that private suits are

permitted, one must look beyond the United States Code to the United States Reports.

4. In the alternative, if the Court concludes that this case is an inappropriate vehicle for resolving the Section 504 question, then it should grant certiorari in *Hawaii v. Vinson*, No. 01-1878, a case presenting the same question, and hold this case pending resolution of *Vinson*. Because *Vinson* presents only the Section 504 question, the State previously suggested, in the interests of judicial economy, that the Court hold the *Vinson* petition pending consideration of this case in order to permit review of the closely related Title II and Section 504 questions together. Pet. 8-9 n.7. Now that the Court has granted certiorari on the Title II question in *Hason*, judicial economy would be equally well served by granting certiorari in *Vinson* or in this case; either course would allow the Court to take up the Section 504 question during the same Term that it decides the Title II question.

CONCLUSION

The first question should be held pending this Court's decision in *California Medical Bd. v. Hason*, No. 02-479. The petition for a writ of certiorari should be granted as to the second question. In the alternative, the second question should be held pending this Court's decision in *Hawaii v. Vinson*, No. 01-1878.

December 23, 2002

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